

UNITED STATES PATENT AND TRADEMARK OFFICE

AGENCY ADMINISTRATIVE ORDER 215-11

**Complaint Process for Allegations of Discrimination Based on Sexual Orientation, Gender
Identity, and/or Expression**

Date of Issuance:

Effective Date:

TABLE OF CONTENTS

Section

- I. Purpose
- II. Authority
- III. Scope
- IV. Policy
- V. Definitions
- VI. Complaint Processing Procedures
- VII. Remedies and Reliefs
- VIII. Representation and Official Time
- IX. Effect on Other AAOs

COMPLAINT PROCESS FOR ALLEGATIONS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, AND/OR EXPRESSION

I. PURPOSE

This Agency Administrative Order (AAO) establishes the United States Patent and Trademark Office's (USPTO) policy and complaint process for processing allegations of discrimination based on sexual orientation, gender identity, and/or expression raised by Agency employees, former employees, and/or applicants for employment. The policy also includes the processing of allegations of reprisal for participating in this process or for opposing sexual orientation and/or gender identity discrimination.

II. AUTHORITY

Executive Order 11478, as amended by Executive Orders 12106 and 13087, (collectively, the Executive Order) prohibits discrimination and ensures equal opportunity for all persons employed or seeking employment with the Federal Government without regard to sexual orientation. The Agency's policy prohibits discrimination and/or reprisal against Agency employees based on sexual orientation.

These procedures covering complaints of discrimination based on sexual orientation, gender identity and/or expression are issued pursuant to the Executive Order listed above; the Executive Memorandum of June 17, 2009, on Federal Benefits and Non-Discrimination; the Civil Service Reform Act of 1978; 5 U.S.C. § 2302; and the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office's authority to develop and issue AAOs, policies, standards and procedures for administrative functions in the USPTO.

III. SCOPE

This AAO describes the procedures for processing complaints where allegations of discrimination are based on sexual orientation, gender identity and/or expression. Bargaining unit employees who may pursue allegations of discrimination based on sexual orientation, gender identity and/or expression through their negotiated grievance procedure may not use the complaint process outlined in this AAO. If you are a member of a bargaining unit, please consult your collective bargaining agreement and contact a union representative for additional information. This AAO also applies to former employees, and/or applicants for employment. In addition, individuals who elect to pursue allegations of discrimination by a USPTO employee based on sexual orientation discrimination and/or gender identity or expression through any other administrative or judicial forum may not use this process, and any complaint filed previously under this procedure will be dismissed.

IV. POLICY

The USPTO Office of Civil Rights (OCR) will provide counseling, process formal complaints, and issue decisions on complaints of discrimination based on sexual orientation and/or gender identity or expression conveyed by USPTO employees, former employees and applicants for employment in accordance with the procedures outlined in this AAO.

V. DEFINITIONS

- A. **Agency representative** is the individual appointed by the Agency to act on its behalf in response to complaints of sexual orientation, gender identity and/or expression.
- B. **Claimant** is the employee or applicant for employment, or former employee who alleges sexual orientation discrimination.
- C. **Day** means a calendar day.
- D. **Employment discrimination based on sexual orientation, gender identity and/or expression** is treating employees, former employees, or applicants for employment differently from similarly situated co-workers or applicants because of their:
 - 1. Sexual orientation or perceived sexual orientation;
 - 2. Gender identity or gender expression;
 - 3. Relationship with individual(s) of a particular sexual orientation or gender identity or expression; or
 - 4. Affiliation with a group that is primarily associated with sexual orientation/gender identity and/or expression issues.
- E. **Gender identity** means the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.
- F. **Gender expression** describes how a person's gender identity is communicated to others through behavior, clothing, hairstyle, voice, and/or by emphasizing, deemphasizing, or changing physical characteristics.
- G. **Retaliation** refers to adverse treatment for participating in the sexual orientation discrimination complaint process, as a claimant or in some other capacity, or for

opposing discrimination based on sexual orientation and/or gender identity or expression.

- H. Sexual orientation** is sexual identification, i.e., homosexuality (gay or lesbian), bisexuality, or heterosexuality, whether such orientation is real or perceived.

VI. COMPLAINT PROCESSING PROCEDURES

A. Informal Complaint Counseling

Any USPTO employee or applicant for employment, or former employee who believes he/she has been subjected to discrimination based on sexual orientation and/or gender identity or expression, must take part in an informal counseling process before filing a formal complaint under this complaint process, below.

An individual who suspects discrimination based on sexual orientation, gender identity, and/or expression must contact an Equal Employment Opportunity (EEO) counselor in the USPTO within forty-five (45) days of the date of the matter believed to be based on sexual orientation discrimination, or in the case of a personnel action, within forty-five (45) days of the effective date of the action. The EEO counselor will advise the claimant of the complaint process, and provide relevant information, including the right to anonymity (unless waived) during counseling; the right to representation throughout the complaint process, including during counseling; the availability of alternative dispute resolution, when both parties agree to participate; and the right to use reasonable official time, when requested and approved in advance, to process the complaint. In most instances, counseling in a case should not exceed ninety (90) days. In the event counseling is unsuccessful, claimants shall be informed in writing of their right to file a formal complaint.

B. Formal Complaint Process

1. Intake and Investigation

Formal complaints of discrimination based on sexual orientation, gender identity and/or expression must be filed with the Director of OCR within fifteen (15) days of the date that the claimant is provided with a final interview and a written notice of his/her right to file a formal complaint. The complaint will be reviewed to assure that it meets jurisdictional prerequisites, such as timeliness. The claimant will be notified in writing of the acceptance or rejection of the formal complaint within sixty (60) days of its receipt by the OCR. The OCR will use the same regulatory standards applied by the Equal Employment Opportunity Commission (EEOC) for complaints of discrimination covered by Title VII when determining whether to accept or dismiss a formal complaint of

discrimination based on sexual orientation, gender identity and/or expression.

An investigation of all accepted issues will be conducted by methods deemed appropriate by the Director of OCR. This may include the use of contract investigators or internal investigation techniques. In the absence of unusual circumstances, the investigation will be completed within one hundred eighty (180) days of the date the formal complaint was received by OCR. The Director of OCR may extend the investigation by an additional ninety (90) day period to ensure that the record is fully developed, and will provide a written notice to the claimant when the investigation period is extended. The Director of OCR, or his/her designee, will review the report of investigation to ensure that it appropriately addresses the accepted issues. Upon completion, a written report of the investigation will be provided to the claimant, the claimant's representative, and to the Agency representative.

2. Findings and Decision

Following a review of the record and investigation of the issues, the Director of OCR will issue a written decision, which will consist of findings on the merits of each issue accepted in the formal complaint of discrimination. The decision will be issued within ninety (90) days of the date of the final report of investigation. The decision will be transmitted to the claimant, the claimant's representative, and the Agency representative. If sexual orientation, gender identity and/or expression discrimination is found, the Director of OCR will order appropriate remedies and relief. If the claimant is dissatisfied with the decision, the claimant may file a request for reconsideration by submitting a written appeal to the Chief Administrative Officer (CAO). The appeal must contain evidence or arguments showing that the Director of OCR's decision was erroneous. A request for reconsideration must be filed with the CAO within fifteen (15) days of the claimant's receipt of the Director of OCR's initial decision.

C. Chief Administrative Officer Review

Within sixty (60) days of receipt of the request for reconsideration, the CAO will issue a decision on the appeal. The CAO will order appropriate remedies and reliefs if discrimination is determined. The decision of the CAO is final and there is no right to further administrative review.

VII. REMEDIES AND RELIEF

Processing complaints of discrimination based on sexual orientation, gender identity and/or expression are not governed by any statutory prohibition or external regulatory

process. Some remedies that are authorized under Title VII, such as front pay, interest on back pay, attorney fees, compensatory damages, or any other monetary relief other than back pay, are not available in such cases.

In cases where there is a finding of discrimination, the individual shall be provided with all appropriate non-monetary equitable remedies and back pay, as authorized by 5 U.S.C. § 5596, and any other applicable statute. Mitigation of damages may be taken into account where appropriate.

If discrimination is determined, appropriate remedies and relief may include:

- Employment offer to applicant;
- Promotional relief;
- Reassignment;
- Cancellation of discriminatory personnel actions; and/or
- Expungement of adverse documentation from Agency records.

In appropriate cases, the CAO may recommend the Agency reprimand or discipline an employee found to have engaged in sexual orientation discrimination based on sexual orientation, gender identity, and/or expression.

VIII. REPRESENTATION AND OFFICIAL TIME

- A. The claimant is entitled to be accompanied, represented, and advised by an individual representative of the claimant's choice at any stage in the processing of a complaint of discrimination or harassment, provided the choice of representative does not create a conflict of interest within the Agency as determined by the Director of OCR.
- B. If the claimant is a USPTO employee, the claimant shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Agency requests for information. If the claimant is a USPTO employee and designates another USPTO employee as a representative, the representative shall similarly have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Agency requests for information. Official time must be requested and approved in advance.
- C. The Agency is not obligated to change work schedules, incur overtime costs, or pay travel expenses to facilitate the choice of a specific representative or to allow the claimant and representative to confer.

IX. EFFECT ON OTHER AAOs

This AAO establishes the USPTO's Complaint Process for Allegations of Discrimination Based on Sexual Orientation and/or Gender Identity or Expression, and supersedes any previous guidance as pertains to the USPTO on this subject.

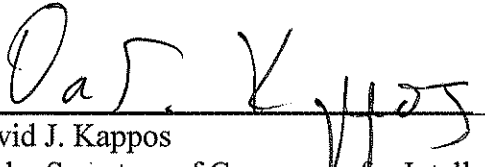
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Deborah S. Cohn
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6/16/10
Date

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David J. Kappos
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

6/17/10
Date

OFFICE OF PRIMARY INTEREST: Chief Administrative Officer/Office of Civil Rights